



International Criminal Tribunal for Rwanda  
Tribunal pénal international pour le Rwanda

ICTR-98-41-T  
12-04-2007  
(34718-34715)

34718  
S. Mwan

TRIAL CHAMBER I

**Before:** Judge Erik Møse, presiding  
Judge Jai Ram Reddy  
Judge Sergei Alekseevich Egorov

**Registrar:** Adama Dieng

**Date:** 12 April 2007

JUDICIAL RECORDS ARCHIVE  
2007 APR 12 12 3: 50  
T. EGOV

THE PROSECUTOR

v.

Théoneste BAGOSORA

Gatien KABJLIGI

Aloys NTABAKUZE

Anatoie NSENGIYUMVA

Case No. ICTR-98-41-T

DECISION ON NTABAKUZE MOTIONS TO ADMIT  
DOCUMENTS UNDER RULE 92 bis

**The Prosecution**

Barbara Mulvaney  
Drew White  
Christine Graham  
Rashid Rashid  
Gregory Townsend  
Kartik Murukutla

**The Defence**

Raphaël Constant  
Allison Turner  
Paul Skolnik  
Frédéric Hivon  
Peter Erlinder  
Marc Nerenberg  
Kennedy Ogetto  
Gershom Otachi Bw'Omanwa

bm

34717

**THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA**

**SITTING** as Trial Chamber I, composed of Judge Erik Mose, presiding, Judge Jai Ram Reddy, and Judge Sergei Alekseevich Egorov;

**BEING SEIZED OF** the Ntabakuze Defence "Motion to Admit Documents Under Rule 92 *bis*", filed on 13 December 2006, and its Corrigendum, filed on 14 March 2007;

**CONSIDERING** the Prosecution's oral submissions on 18 and 19 January 2007, and the Ntabakuze Reply, filed on 22 January 2007;

**CONSIDERING** the Bagosora Defence "Submissions on Document Sought to Be Admitted by Ntabakuze Defence Pursuant to Rule 92 *bis*", filed on 18 January 2007;

**BEING FURTHER SEIZED OF** the Ntabakuze "Motion to Admit a Sworn Statement Under Rule 92 *bis*", filed on 22 January 2007, and its Corrigendum, filed on 23 February 2007;

**CONSIDERING** the Prosecution Response thereto, filed on 29 January 2007;

**HEREBY DECIDES** the motions.

**INTRODUCTION**

1. The Chamber previously denied the Ntabakuze Defence request for a subpoena to be issued to Michael Hourigan, a former Prosecution investigator whose testimony related to his investigations into the shooting down of the airplane carrying President Habyarimana on 6 April 1994. The basis of the decision was that the Indictment does not attribute responsibility for this attack to any of the Accused or their alleged co-conspirators.<sup>1</sup>

2. Pursuant to Rule 92 *bis*, the Ntabakuze Defence now seeks to tender into evidence a sworn affidavit of Mr. Hourigan with three annexes ("the Affidavit").<sup>2</sup> On 18 January 2007, the Accused Nsengiyumva testified briefly about the Affidavit.<sup>3</sup> At that time, the Prosecution opposed its admission.<sup>4</sup>

3. The Defence also seeks to admit the sworn statement of Amadou Deme, a former member of the United Nations Assistance Mission in Rwanda (UNAMIR) in 1993-94. As a former Prosecution investigator, who worked closely with Mr. Hourigan, Mr. Deme was originally scheduled to testify before the Chamber as a witness for Ntabakuze. Efforts were made to secure his testimony by video link, but the Defence withdrew him as a witness in early September.<sup>5</sup>

<sup>1</sup> *Bagosora et al.*, Decision on Request for Subpoenas of United Nations Officials (TC), 6 October 2006, para. 12.

<sup>2</sup> The sworn affidavit, dated 17 January 2007, was later replaced by an affidavit of 8 March 2007, see Defence Corrigendum of 14 March 2007. The French version of Annex 1 has already been admitted as Defence Exhibit DB 247; T. 2 November 2005 p. 62.

<sup>3</sup> T. 18 January 2007 p. 18.

<sup>4</sup> *Ibid.*, pp. 76-78.

<sup>5</sup> *Bagosora et al.*, Decision on Testimony of Amadou Deme by Video-Link (TC), 29 August 2006; T. 7 September 2006 pp. 83-84; T. 8 September 2006 p. 36.

*Bh*

34716

## DELIBERATIONS

4. Pursuant to Rule 92 *bis*, a written statement may be admitted in lieu of oral testimony provided that it "goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment". In addition, the statement must meet the formal requirements of Rule 92 *bis* (B). As documentary evidence, any written statement tendered for admission must be relevant and have probative value under Rule 89 (C).<sup>6</sup>

### (i) Affidavit of Michael Hourigan

5. The Ntabakuze Defence argues that the Affidavit is admissible under Rule 92 *bis* because it does not go to the acts and conduct of the Accused as charged in the Indictment, is of a cumulative nature, provides historical and political background, and meets the formal requirements of Rule 92 *bis* (B). The document is relevant and has probative value.<sup>7</sup> The Bagosora Defence supports the Ntabakuze request for admission of the Affidavit. The lack of investigations in order to clarify the identity of the perpetrators of the assassination of President Habyarimana violates the fundamental right of the Accused to a fair trial.<sup>8</sup>

6. The Prosecution objects to the admission of the Affidavit as not being relevant or having probative value. It points out that the Ntabakuze Defence has acknowledged that "the evidence does not go to the heart of the subject matter in *this* trial".<sup>9</sup> The written statement comes from a disgruntled former Tribunal employee, who has breached his duty of confidentiality to the United Nations by providing the annexed documents. The formal requirements of Rule 92 *bis* also present a problem.<sup>10</sup>

7. The Chamber finds that the formal requirements of Rule 92 *bis* (B) are met by the Corrigendum submitted by the Defence on 14 March 2007, which provided the signature and verification of a "Presiding Officer" in accordance with that provision.

8. The other conditions in Rule 92 *bis* have also been met. The subject matter of the Affidavit is the responsibility for the assassination of President Habyarimana. This has no bearing on the allegations against the Accused and thus does not go to his acts and conduct. The evidence is also of a cumulative nature, as the Chamber has already heard a number of witnesses testify about similar issues.

9. As regards Rule 89 (C), the Chamber has already held that any evidence on the attack of the Presidential plane is "a matter of contextual significance ... and of collateral and indirect relevance".<sup>11</sup> The Affidavit and its annexes contain background information which

<sup>6</sup> *Bagosora et al.*, Decision on Ntabakuze Motion to Deposit Certain United Nations Documents (TC), 19 March 2007, para. 9; *Serugendo*, Decision on Defence Motion for the Admission of Written Witness Statements under Rule 92 *bis* (TC), 1 June 2006, para. 3.

<sup>7</sup> Motion, paras. 2-3.

<sup>8</sup> The Defence contests the actual reference to Colonel Bagosora on page 3 of the second document annexed to the Affidavit, entitled "Secret Internal Memorandum", on the grounds that there is no legal or factual basis for including him in the list of FAR command hierarchy gathered by Hourigan; Bagosora Submissions, paras. 4-10.

<sup>9</sup> Quote from Motion, para. 3.

<sup>10</sup> T. 18 January 2007 pp. 76-78.

<sup>11</sup> *Bagosora et al.*, Decision on Request for Subpoenas of United Nations Officials (TC), 6 October 2006, para. 7.

6/1

should be admitted into evidence, having sufficient probative value. The weight of the evidence will be considered at a later stage. Consequently, the Defence request is granted.<sup>12</sup>

*(ii) Statement by Amadou Deme*

10. The Defence submissions in favour of admission are similar to its arguments relating to the Hourigan Affidavit.<sup>13</sup> The Prosecution argues that the facts contained in the statement are in dispute and that it should be given the opportunity to cross-examine the witness. Amadou Deme was available to testify orally but the Defence decided not to call him.<sup>14</sup>

11. The Chamber notes that Mr. Deme's statement covers his co-operation with Mr. Hourigan as well as meetings with an informant, Jean-Pierre, concerning alleged plans of violence. The Defence had the opportunity to call Mr. Deme as a witness in 2006 but declined to do so. Instead it submitted his statement through its motion of 22 January 2007, after the closure of the evidentiary phase of the trial. Admission of documents at this late stage of the trial can only be allowed in exceptional circumstances.<sup>15</sup> The Chamber cannot see any such circumstances and denies the request.

**FOR THE ABOVE REASONS, THE CHAMBER**

**GRANTS** the motion in part and admits the Affidavit of Michael Hourigan with three annexes;

**ORDERS** the Registry to assign this set of documents one exhibit number; and

**DENIES** the motion in all other respects.

Arusha, 12 April 2007

Erik Mose  
Presiding Judge

Jai Rani Reddy  
Judge

Sergei Alekseevich Egorov  
Judge

[Seal of the Tribunal]



<sup>12</sup> When assigning an exhibit number, the Registry should use the corrected version of the documents, see the Defence Corrigendum of 14 March 2007.

<sup>13</sup> Motion, paras. 2-5.

<sup>14</sup> Response, para. 3.

<sup>15</sup> *Bagosora et al.*, Decision on Bagosora motion to tender statement of Witness B-06 (TC), 3 April 2007, para. 4; Decision on Bagosora motion for disclosure of agenda (TC), 11 April 2007, para. 5.



## TRANSMISSION SHEET FOR FILING OF DOCUMENTS WITH CMS

**COURT MANAGEMENT SECTION**  
(Art. 27 of the Directive for the Registry)

### I - GENERAL INFORMATION (To be completed by the Chambers / Filing Party)

<b>To:</b>	<input checked="" type="checkbox"/> Trial Chamber I N. M. Diallo	<input type="checkbox"/> Trial Chamber II R. N. Kouambo	<input type="checkbox"/> Trial Chamber III C. K. Hometowu	<input type="checkbox"/> Appeals Chamber / Arusha F. A. Talon
	<input type="checkbox"/> Chief, CMS J.-P. Fomété	<input type="checkbox"/> Deputy Chief, CMS M. Diop	<input type="checkbox"/> Chief, JPU, CMS M. Diop	<input type="checkbox"/> Appeals Chamber / The Hague R. Muzigo-Morrison K. K. A. Afande
<b>From:</b>	<input checked="" type="checkbox"/> Chamber I Judge Mose Judge Reddy Judge Egorov (names)	<input type="checkbox"/> Defence (names)	<input type="checkbox"/> Prosecutor's Office (names)	<input type="checkbox"/> Other: (names)
<b>Case Name:</b>	The Prosecutor vs. BAGOSORA ET AL.		<b>Case Number:</b> ICTR-98-41-T	
<b>Dates:</b>	Transmitted: 11 APRIL 2007		Document's date: 11 APRIL 2007	
<b>No. of Pages:</b>	4	<b>Original Language:</b>	<input checked="" type="checkbox"/> English <input type="checkbox"/> French <input checked="" type="checkbox"/> Kinyarwanda	
<b>Title of Document:</b>	DECISION ON NTABAKUZE MOTIONS TO ADMIT DOCUMENTS UNDER RULE 92 bis			
<b>Classification Level:</b>		<b>TRIM Document Type:</b>		
<input type="checkbox"/> Strictly Confidential / Under Seal		<input type="checkbox"/> Indictment	<input type="checkbox"/> Warrant	<input type="checkbox"/> Correspondence
<input type="checkbox"/> Confidential		<input checked="" type="checkbox"/> Decision	<input type="checkbox"/> Affidavit	<input type="checkbox"/> Notice of Appeal
<input checked="" type="checkbox"/> Public		<input checked="" type="checkbox"/> Disclosure	<input type="checkbox"/> Order	<input type="checkbox"/> Appeal Book
		<input type="checkbox"/> Judgement	<input type="checkbox"/> Motion	<input type="checkbox"/> Book of Authorities
			<input type="checkbox"/> Submission from non-parties	<input type="checkbox"/> Submission from parties
			<input type="checkbox"/> Accused particulars	

### II - TRANSLATION STATUS ON THE FILING DATE (To be completed by the Chambers / Filing Party)

**CMS SHALL** take necessary action regarding translation.

Filing Party hereby submits only the original, and will **not submit** any translated version.

Reference material is provided in annex to facilitate translation.

Target Language(s):

English                                     French                                     Kinyarwanda

**CMS SHALL NOT** take any action regarding translation.

Filing Party hereby submits **BOTH the original and the translated version** for filing, as follows:

Original	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda
Translation	in	<input type="checkbox"/> English	<input type="checkbox"/> French	<input type="checkbox"/> Kinyarwanda

**CMS SHALL NOT** take any action regarding translation.

Filing Party will be submitting the translated version(s) in due course in the following language(s):

English                                     French                                     Kinyarwanda

**KINDLY FILL IN THE BOXES BELOW**

<p><input type="checkbox"/> The OTP is overseeing translation.</p> <p>The document is submitted for translation to:</p> <p><input type="checkbox"/> The Language Services Section of the ICTR / Arusha.</p> <p><input type="checkbox"/> The Language Services Section of the ICTR / The Hague.</p> <p><input type="checkbox"/> An accredited service for translation; see details below:</p> <p>Name of contact person:</p> <p>Name of service:</p> <p>Address:</p> <p>E-mail / Tel. / Fax:</p>	<p><input type="checkbox"/> DEFENCE is overseeing translation.</p> <p>The document is submitted to an accredited service for translation (fees will be submitted to <b>DDCMS</b>):</p> <p>Name of contact person:</p> <p>Name of service:</p> <p>Address:</p> <p>E-mail / Tel. / Fax:</p>
---	---

NATIONAL ARCHIVE  
 APR 12 12 3:50 PM '07

### III - TRANSLATION PRIORITISATION (For Official use ONLY)

<input type="checkbox"/> Top priority	<b>COMMENTS</b>	<input type="checkbox"/> Required date: 8:00
<input type="checkbox"/> Urgent		<input type="checkbox"/> Hearing date:
<input type="checkbox"/> Normal		<input type="checkbox"/> Other deadlines: